Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975
No. 75-1248

ANTHONY B. CATALDO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

MOTION UNDER RULE 31 (2) FOR A COMMON LAW WRIT OF CERTIORARI AND PETITION FOR CERTIORARI UNDER RULE 21 OR IN SUPPORT OF MOTION

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SUPREME COURT OF THE UNITED STATES
OF AMERICA

- -x

ANTHONY B. CATALDO, :

Petitioner, :

-against- :

UNITED STATES OF AMERICA, :

Respondent. :

- -x

S I R:

The petitioner will move this court at a stated motion term at the Courthouse at Washington, D.C., for an order granting a Common Law Writ of Certiorari pursuant to Rule 31.2 of the rule of this court and for such other and further relief as may be just and proper in the premises.

Dated: New York, N.Y.
January 31, 1976.

Anthony B. Cataldo

Yours etc.,
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SUPREME COURT OF THE UNITED STATES
OF AMERICA

- -x

ANTHONY B. CATALDO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

- -x

Petitioner, ANTHONY B. CATALDO, an attorney at law, held for contempt allegedly committed within the civil action as captioned above by the Judge presiding, the Hon. Richard H. Levet of the United States District Court for the Southern District of New York seeks a review by this Honorable Court, of the judgments of the Court of Appeals, Second Circuit, denying petitioner's requests to vacate said order of contempt as to form and substance, which review is being sought, either by a writ of certiorari pursuant to Rule 21 of the Rules of this court, or by a motion

which is herewith made for a Common Law Writ of Certiorari pursuant to Rule 30 of the Rules of this court, in the event that this court rules that it does not have jurisdiction to grant certiorari under Rule 21. In either case, petitioner's objective is the same, viz; a review of the order of contempt on the merits to vacate it.

QUESTIONS PRESENTED

1. Does the citation of contempt violate petitioner's constitutional rights because the order was entered despite trial counsel's compliance with the court's oral direction on the trial to adduce proof of plaintiff's case in the manner directed by the court despite the fact that such direction prevented a full disclosure of the facts of plaintiff's case.

2. Wasn't the order of contempt unlawfully made in violation of Rule 42 of

the Rules of Criminal Procedure and of the many cases decided by this court because it was made four days after the trial had ended and it untruthfully stated that a show cause order was issued and a hearing was held when neither was done, and no specifications or notice of hearing was ever served upon petitioner.

3. Wasn't the procedure adopted by the Court of Appeals in treating with the efforts of petitioner to seek a review of the contempt order arbitrary and unconstitutionally contrary to the Article VI of the constitution in that they ignored the decisions of this court on the operative facts and violated the Rules of Appellate Procedure; and found one excuse after another to deny petitioner's appeals; and in their totality weren't these excuses evidence of an unlawful conception of its duties as a duly constituted court.

4. Wasn't the refusal by the Court of Appeals to apply Rule 4 (b) of the Rules of Appellate Procedure a refusal to follow a rule promulgated by this court according to law and an unlawful refusal to grant petitioner the benefits flowing therefrom.

OPINIONS BELOW

All decisions and judgments of the courts below are:

1. Decision of Judge Levet, dated June 26, 1973 dismissing the civil action. Because of its length, a true copy will be submitted separately.

2. Order of contempt, dated May 16, 1973, is appendix A attached hereto.

3. Judgment of Court of Appeals, affirming judgment in civil action, dated June 25, 1974, is appendix B attached hereto. Officially reported at 501 F. (2) 369.

4. Order of Judge Levet, dated

October 14, 1974, denying motion to vacate contempt order is appendix C attached hereto.

5. Judgment of Court of Appeals, affirming order of October 14, 1974, dated April 17, 1974 is appendix D attached hereto.

6. Judgment of Court of Appeals, dismissing appeal from order of contempt, dated September 30, 1975 is appendix E attached hereto.

7. Decision of Court of Appeals, permitting filing of petition for re-hearing, dated October 22, 1975 is appendix F attached hereto.

8. Decision of Court of Appeals, dated January 6, 1976 denying re-hearing is appendix G attached hereto. Also a Court of Appeals decision of January 6, 1976 denying suggestion for an en banc hearing is appendix H attached hereto.

Other than appendix B above, none of the other decisions and judgments have been officially reported.

JURISDICTION OF THIS COURT

Jurisdiction to consider the motion for a Common Law Writ of Certiorari is given to this court by the Writs Statute 28 U.S.C.A. 1651. There is no time limit specified for the filing of such a motion.

Jurisdiction to consider the petition for a Writ of Certiorari to the Court of Appeals, Second Circuit, is under 28 U.S.C.A. 1254 (1) and 2101 (c). The order of the Court of Appeals denying a re-hearing is dated January 6, 1976. Whether the order of contempt is reviewable as a criminal order or a civil order is one of the questions to be decided. In any event, the petition is timely filed; except for the effect of the Court of Appeals' order of October 22, 1975 which is the subject

of petitioner's argument under the reasons why this court is being asked to consider the motion for the Common Law Writ of Certiorari.

It is also arguable that a direct appeal lies to this court under 28 U.S.C.A. 1252 because in dismissing the appeal from the order of contempt as untimely, the Court of Appeals refused to follow the plain dictates of Rule 4 (b) of the Rules of Appellate Procedure which stipulates that an appeal in a criminal case is timely if notice is filed within 10 days after the entry of the order in the criminal docket. Yet, the Court of Appeals refused to recognize the right of litigants granted under such rule by this honorable court. If the action of refusal is tantamount to a holding that Rule 4 (b) was unconstitutional, then the direct right of appeal exists.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

Constitution of the United States, Amendment V: "No person shall * * * be deprived of life, liberty or property without due process of law".

Constitution of the United States, Article VI: "This Constitution and the Laws of the United States which shall be made in pursuance thereof; * * * shall be the supreme Law of the Land, and the judges in every State shall be bound thereby * * *".

STATUTES

18 U.S.C. 401. Power of Court. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as --

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. 3772. Procedure after verdict. The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States District courts, in the district court for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. * * *

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

28 U.S.C. 1252. Direct appeals from decision invalidating Acts of Congress. Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District Court of the Virgin

Islands and any court of record of Puerto Rico, holding an Act of congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party. * * *

28 U.S.C. 1254. Courts of Appeals; certiorari; appeal; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to a civil or criminal case, before or after rendition of judgment or decree. * * *

28 U.S.C. 1651. Writs. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to

the usages and principles of law. * * *

28 U.S.C. 2101. Supreme Court; time for appeal of certiorari; docketing; stay. * * * (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

RULES

Rule 22 (2) of the Supreme Court of the United States. 2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are

filed with the clerk within thirty days after the entry of such judgment. * * *

Rule 4 (b) of Appellate Procedure.

Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. * * * A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. * * *.

Rule 42. Rules of Criminal Procedure.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that

it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and described it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so

provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT OF FACTS

In 1969 petitioner filed a complaint for himself and his wife as plaintiffs against the United States to recover moneys paid under an alleged unlawful assessment for additional income tax for 1963 in the United States District Court of the Southern District of New York. The suit came on to be heard before the Hon. Richard H. Levet, a judge of that court on the 10th, 11th, and 14th days of May, 1973.

The trial had been a travesty on

justice because of the judge's interference with trial counsel's plan of proof of his case. The trial judge even threatened to use his power of contempt to obtain compliance with his own direction of what order of proof the plaintiff's case should be. Plaintiff complied rather than run the risk of contempt. Following such directions, many issues of fact were never presented except in writing after the trial had finished. Also, the Assistant United States attorney suborned perjury by inducing an Internal Revenue Agent to commit perjury and although such proof of perjury was in writing, which was called to their attention, both the district and the Court of Appeals ignored it. The tax refund suit was dismissed largely for lack of proof.

On May 18, 1973, four days after the trial was finished, the judge caused an

order to be docketed in the civil docket under the docket number of the tax refund suit purporting to hold petitioner for contempt of court and fining him $50. The order was entered without a trial, with no notice to petitioner and no specifications of the charges were made or given. It is appendix A hereto. It, nevertheless, recited: "* * * and the said attorney, * * * having been required to show cause why he should not be held for civil contempt, and after hearing the said Anthony B. Cataldo on the 11th and 14th days of May, 1973, it is

Adjudged that said Anthony B. Cataldo is guilty of contempt of court, * * *". (Underlining added)

The facts that there was no show cause order, no hearing on the contempt on the 11th and 14th days of May, 1973, and no notice and no specifications, were

claimed by petitioner and the truth thereof was conceded by government counsel on the argument of the appeal from the contempt order.

The appeal from the final judgment of dismissal of the civil suit came on to be heard by the Court of Appeals which rendered its decision affirming the judgment on June 25, 1974 (501 F. (2) 396). The same decision said of the appeal from the order of contempt:

> "In the course of the proceedings in the District Court, appellant Anthony B. Cataldo was summoned to show cause why he should not be held in contempt. A judgment so holding was filed on May 16, 1973. Although appellants proffer various arguments attacking the validity of this latter judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review."

In a footnote, the court said further:

> "Although Cataldo was summoned to show cause why he should not be held for contempt, both appel-

> lants and appellee now treat the contempt judgment as if it were criminal in nature and, indeed, it would seem likely in light of the circumstances surrounding it that it was the judge's intent that it should be so construed."

There was no evidence in the record to support the holding that Cataldo was summoned to show cause why he should not be held for contempt. This claim of a summons was a product of the court's imagination. In the body of its decision, the court recognized the efforts of petitioner at having this civil contempt order vacated as erroneous. Yet, in the footnote, the court, again, without support in the record, said that appellant treated the order as a criminal contempt. As though saying that, the court need not recognize that the district court had erred in referring to the contempt as civil in character. As a civil contempt it could have

been reviewed on the appeal from the civil judgment and if it was found that it was not properly a civil contempt, error was made and reversal was in order. The court arbitrarily misread petitioner's effort at proving that as a civil contempt order it was unlawful. In resorting to calling it a criminal contempt, the Court of Appeals erred twice. It refused to recognize its invalidity as a civil contempt and it refused to appraise the merits by simply calling it a criminal contempt. Its statement that it seemed likely that the judge intended that it should be construed as a criminal contempt is pure conjecture and surmise having no support in the facts and hence, it was erroneous.

Appellant then moved before Judge Levet to vacate the order because it was his error in calling the order one for civil contempt which had caused petitioner to

seek its review within the appeal from the final judgment in the civil suit. Any normal and fair minded person would correct such a mistake, but not Judge Levet. He did not consider the point advanced for vacating the order, nor did he adopt the surmise and conjecture of the Court of Appeals that he had intended the order as a criminal contempt. He just denied the motion. An appeal followed. The notice of appeal designated the appeal as being from this last order of Judge Levet, which was dated October 14, 1974, appendix C. Surely, the refusal to correct a patent error was an abuse of discretion and thus an appeal could properly follow from such order and in the process, it was possible to review the order of contempt itself.

Government counsel moved to dismiss the appeal on the ground that an appeal does not lie from a denial to vacate a

judgment pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure. This motion came on to be heard at the same time as the appeal itself. The Court of Appeals would not hear any arguments on the merits of the appeal but limited petitioner to argue his defense to the motion. Reversal for an abuse of discretion was not enough. Both government counsel and the court forgot that the order was denominated by the Court of Appeals itself in its decision affirming the dismissal of the action as criminal in nature. In the wake of such nomenclature, it could not follow that Rule 60 (b) of the Civil rules would apply to a criminal order. The motion to vacate could properly be made under Rules 33 and 36 of the Criminal Rules. An order denying a motion under either of those criminal rules is appealable. The court affirmed the order of

denial of the motion to vacate an order of Judge Levet. See appendix D.

Petitioner then filed a notice of appeal from the order of contempt. All appeals were taken immediately upon the Court of Appeals making known its position on the last appeal before it. Government counsel again moved to dismiss but without a brief. He said he would rely upon the brief he submitted on the previous appeal. The Court of Appeals made its decision of September 30, 1975, appendix E. This dismisses the appeal because it was untimely saying of Rule 4 (b) of the Rules of Appellate Procedure that it would not apply to "these facts" and without establishing any other date from which to count the applicable time to appeal, it dismissed the appeal. Then it volunteered, unnecessarily, to say "in an excess of caution" they heard arguments on the merits and can

find no reason to disturb the contempt order. Here was the Court of Appeals after a dismissal deciding the merits of the appeal against petitioner, not on the basis of the facts themselves, but on the basis of arguments of the facts advanced by government counsel. In effect, the Court of Appeals joined the Justice department in denying and finding that contempt was committed when it was not.

On October 14, 1975, petitioner found himself unable to finish his petition for rehearing and on October 15, 1975 he submitted a motion to enlarge his time. Appended to the motion was a draft of the petition he would file. The Court of Appeals made its order on October 22, 1975 approving the filing of the petition within 10 days after the decision, appendix F.

The petition was put in final form and it was filed on the 23rd day of October,

1975. A copy of this petition is filed simultaneously herewith because it contains petitioner's full arguments on the facts and the law as to why the order of contempt should be vacated despite the decisions of the Court of Appeals. On January 6, 1976, the Court of Appeals made its decision (appendix G) recognizing its error of deciding the merits upon the basis of counsel's remarks on the argument of the appeal and changed this to saying that it took notice of the appendix on the appeal in the civil action. By this time, the creditability of the court in recognizing its errors but refusing to correct them and instead, in arbitrarily committing another error, was seriously in question. For this reason, this honorable court is respectfully prayed to spare some of its precious time to considering the merits of petitioner's appeal from the order of con-

tempt upon the facts. Certainly, the Court of Appeals acted unconstitutionally in denying petitioner his day in court on his appeals to that court. Also, the court violated the command of Article VI of the Constitution that all judges shall obey the Law of the Land. It had even refused to obey the plain mandate of this court in respect of the prerequisites to the entry of valid orders of contempt and the further mandate of this court in establishing the time when an appeal from a criminal judgment or order shall start to run, viz; 10 days after the entry in the criminal docket.

THE REASON FOR THE MOTION FOR A COMMON LAW WRIT OF CERTIORARI

Petitioner fears that through the action of the Court of Appeals in entering its order of October 22, 1975, appendix F, permitting the filing of the petition for

re-hearing that it may be argued that such petition for a Writ of Certiorari under Rule 21 of the Rules of this court is out of time, despite its having been filed within 30 days of the date of the order denying re-hearing. That order of October 22, 1975 (appendix F) reads:

> "It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated October 15, 1975 for leave to file a petition for re-hearing not to exceed 25 pages of printing by any other process of duplication or copying to and including ten days after decision in the event this motion is granted be and it hereby is granted."

Petitioner did on the 23rd day of October file the petition for re-hearing which was denied January 6, 1976 (appendix G). What affect does the said order of October 22, 1975 have on the time for filing a petition for certiorari to review its order of September 15, 1975?

Normally, whether the order appealed from should be considered a criminal judgment or a civil contempt, this petition would be timely. It was filed within 30 days of the order denying re-hearing. But, the wording of said order in stating "in the event this motion is granted" makes the intent of the order ambiguous. If the reference to the word "motion" refers to the motion by notice of October 15, 1975 for leave to file an enlarged brief, then this petition is timely. If that word refers to the decision on the petition for re-hearing implying that that motion shall have to be granted or the time to file the petition runs from September 15, 1975, then this petition is out of time. Accordingly, petitioner advances his motion which ought to be granted because a court which induces the filing of a petition to review its former decision ought not to be able to

cut off a litigant's right to appeal from the original decision. In this case, that date is September 30, 1975, the date of the Court of Appeal's decision dismissing the appeal from the order of contempt. It would be wholly out of keeping with fair play and justice if the order of October 22, 1975 would be interpreted as cutting off petitioner's right to file the petition under Rule 21. Hence, if this court agrees with petitioner that he has the right to file his petition for certiorari under Rule 21, then this motion need not be considered by the court and it may go to the petition which it is felt states valid reasons for review by this court.

THE REASONS WHY A WRIT OF CERTIORARI SHOULD BE ISSUED IN THIS CASE

The Court of Appeals has unabashedly provided evidence of unlawfully disregarding Rule 4 (b) of the Rules of Appellate

Procedure and of disregarding the cases of this court applicable to contempt orders made after the trial. It has even made clear error on the consideration of the contempt order as a civil contempt order within the appeal from the final judgment in the civil suit. Also, it has so far sanctioned the departure by the district court from accepted and the usual course of judicial proceeding as to call for an exercise of this court's power of supervision.

To start with the order was called a "civil" contempt order by Judge Levet and he caused it to be entered in the civil docket where the case within which the order was made is noted. Petitioners had duly appealed from the final judgment in that case. Such an appeal brings up for review all orders entered within that action.

Further, a civil contempt order is interlocutory and, as to a party to the litigation, an appeal isnot available until there is a final judgment in the entire action. See 11 Wright & Miller, Federal Practice and procedure, Section 2690, p. 592; Fox v. Capital Co., 299 U.S. 105; Fireman's Fund Ins. Co. v. Myers, 439 F. (2) 834 and McCrone v. United States, 307 U.S. 61; and Duell v. Duell, 178 F. (2) 683.

A civil contempt proceeding becomes moot upon the termination of the controversey that gave rise to the underlying litigation; see Gompers v. Buck's Stove and Range Co., 221 U.S. 418; and DeParcq v. U.S.Dt.Ct., 235 F. (2) 962. Hence, contempt orders may not be invoked after the trial of the case is had.

A fine of $10,000 in Fox v. Campbell was adjudged to be for a civil contempt because the fine was to pay the creditor's

attorney for his labors. Here, the fine was levied, if the judge is to be believed, for petitioner's failure to adopt the course of the proof urged by the court upon petitioner. Such urgings were meant to be of help to the defendant. It could not and did not help plaintiff. All the elements of a civil contempt are found in the order under review. But, this inquiry into making a distinction between a criminal and civil contempt order need not be made. The question is when the district court actually said it was a civil contempt and the contemnor in reliance thereon waited to have it reviewed upon the appeal from the final judgment, may he urge error by saying that it was not a lawful order of civil contempt. As a civil contempt it was incorrect in several respects. One respect has been shown above. Another is the fact that no charge of disobedience of

a prior valid order supporting such contempt is shown to exist. It would have been unlawful, anyway, for the district court to order trial counsel to forego his own plan of trial and to limit himself to the proof of the business character of the claimed expense, not by oral testimony of the tax payer but by the production of other unidentified proof. Due process was violated by the trial judge in making that demand. When he threatened contempt if trial counsel did not proceed as ordered, and as it was impossible to know what the judge wanted, trial counsel stopped his proof at the time and went on to something else. He knew this was wrong, but he had a right to appeal and he was satisfied with making a record of the proceedings so that he might press his point of error on appeal.

On that appeal, he urged reversal of

the judgment because the judge's interference had denied him due process, and he urged reversal of the order because it was an unlawful civil order of contempt. Also, he argued that the order of contempt was invalid even if it were considered a criminal order of contempt because it violated Rule 42 of the Rules of Criminal Procedure in that it contained no specification that the contempt was committed within the immediate presence of the court, a prerequisite under subdivision (a) and that there was no trial, notice or specification as required by subdivision (b) of the rule. Also, it was argued that reversal was mandated by the later cases of this court dealing with contempt orders made after trial requiring a trial on notice and specifications;see, Anderson v. Dann, 19 U.S. (6 Wheat) 204; Bloom v. Illinois, 391 U.S. 194; Brown v. United States, 359

U.S. 41; Cooke v. United States, 267 U.S. 517; Harris v. United States, 382 U.S. 162; Holt v. Virginia, 381 U.S. 162; In re Little, 404 U.S. 553; In re McConnell, 370 U.S. 230; Mannes v. Meyers, 419 U.S. 449; Mayberry v. Pennsylvania, 400 U.S. 455; and Taylor v. Hayes, 418 U.S. 488. Of course, there is no complaint about the absence of a jury trial because the fine was $50 but the other reasons for the order's invalidity should have been noted and petitioner granted the protection of the law appropriate to such case.

In their totality, the actions of the courts below have frustrated justice in its essential elements. The courts were established by Congress pursuant to constitutional command to provide judicial power to resolve disputes under law. Avoiding the application of the law is avoiding doing their duty. In fact, it is not only an absence of acting in the line of duty

but it is obviously an affirmative action of the Court of Appeals of refusing to follow the law. However, the Court of Appeals may find justification for their action in the Harmless Error Rule or in their own rule of being reluctant to reverse, or whatever, when they act as perversely as they have in this case, they have broken the law and this court has consistently held that no one is above the law. See United States v. Nixon, 418 U.S. 683 ~~917~~. Here, Article VI was transgressed by such actions.

Further error was committed by the Court of Appeals by refusing to recognize the applicability of Rule 4 (b) to the petitioner's appeal directly from the order of contempt. That rule was adopted by this court and reported to Congress on January 15, 1960 and it has the force of statute, see Moore's Federal Practice, par. 201.39.

What does a motion to vacate the order of contempt by an application to the judge himself on the ground that the Court of Appeals had said that the order was not civil contempt order and hence, as petitioner had been misled by the trial court's error, it should be vacated, got to do with the fixing of the time to appeal from the order of contempt itself, where that time is fixed by statute. Plainly, none. Besides a motion to vacate is permitted by the Rules of Criminal Practice and those remedies are as available to petitioner as the appeal. How was there an extension of time to appeal effected by this action of the petitioner which was dictated by the court's own error in refusing to reverse an invalid order. Moreover, these excuses of the court are irrelevent and inconsequential and evidence a court engaged in making arbitrary decisions to avoid cor-

rection of a palpable error. The rule is plain and simple. A criminal order is appealable by filing a notice within 10 days of its entry in the criminal docket. Hence, the filing of petitioner's notice of appeal was timely even though it was made some ten months after the date of the order. The rule also codifies the holding of this court in Lemke v. United States, 346 U.S. 325; see 3 Moore's Federal Practice, par. 204.20, permitting the filing of a notice of appeal from a criminal order before the order was docketed. There is no ambiguity about this language as the excuse of the Court of Appeals would imply. In fact, that statement reads rather like a refusal to do its duty of construing statutory language. The action is a direct refusal to follow the Rules of this court, a consequence of an abject refusal to find against the district court. Rule 4 (b)

has never been interpreted by this court. This case presents an occasion to do so.

This brings up the reasons why this court should grant the writ. Petitioner, it is respectfully submitted, has been observing the inability of this honorable court to handle the work load Americans need this court for. That it is busy beyond reason is recognized, but recognized too, are the many cases rejected for review by this court. Why do so many Americans feel compelled to seek the aid of this court is the real question. It is petitioner's view that the failure of the Court of Appeals to review the facts of the cases before them is at the bottom of the whole problem. There would be no need for a National court to read petitions for certiorari. There would be no case load as great as it is for this court if the Court of Appeals would do that job.

Can it be doubted that this court has time and again stated that courts must use rules of practice to further justice and that justice is the finding of the truth within the dispute which is the object and aim of all the frantic court activity that provides the judicial power. This court has said that Federal courts should not shrink from their solemn responsibility to "guard, enforce and protect every right granted or secured by the Constitution of the United States". See Robb v. Connelly, 111 U.S. 624, 637; and Kusper v. Pontikes, 414 U.S. 51; c/f Foman v. Davis, 371 U.S. 178; and Sanders v. United States, 373 U.S. 1. The failure to weigh the facts for whatever reason, not only does an unjustice to the litigants and frustrates the very ends and purposes of the courts, but, that very refusal also creates a confraternity with the District judges which only in-

creases violations of law at the trial level; which increases the load for the Court of Appeals, whose own disregard passes those cases onto this court in an ever increasing work load with consequent decrease in the dispositions of justiciable problems on their merits.

It seems that surmising that all district judges are nice fellows and capable in their own right to execute an act that is more God-like than any other act attempted by a human, viz; the act of judging fellow-humans, can be done by all district judges according to law, well and faithfully and impartially, denies the frailty of human beings. Our forefathers rather devised a system of checks and balances. In comparing the human activity in government of today, Americans should be ever thankful to the founding fathers for that system of checks and balances.

The confraternity above mentioned has destroyed checks and balances in our court system and has installed a system based upon a hope that incumbents in judicial office will act in God-like fashion. That is an impossible dream.

We have a system of courts which would work if the checks and balances acknowledging the need to correct human failures, is made to work. This court could talk plain about the actions of the Court of Appeals and in plain and firm language say that it must read the transcript of the trial and read it impartially. What if Judge Levet acted beyond his powers. He should be told so. Then Judge Levet would not attempt to give vent to his impatience but permit a lesser legal light than himself to try the case. It would not hurt him one bit if counsel were either to find himself wrong or right when he accomplishes

what he had planned to do for his client.

The result of this kind of change would be like a fresh wind blowing through the cob-webbed Halls of Justice. People would take notice. The creditability of the Courts would be recaptured. All because this fine of $50 was brazenly imposed with no law to support it and the district judge was brazenly upheld by a Court of Appeals finding excuses for refusing to strike it down in complete frustration of its duty.

This court would do well, also, to review the facts found by the lower courts despite the rule that it shouldn't if found by the Court of Appeals as well as the trial court. But that is another story. Here, both the courts below have disregarded the facts to arrive at their decision but petitioner had preserved his right to a review of the facts by this honorable court.

CONCLUSION

WHEREFORE petitioner respectfully prays this court to grant him a review of the order of contempt on the merits.

Respectfully submitted,

Anthony B. Cataldo

ANTHONY B. CATALDO
Attorney for petitioner,
pro se

CONTEMPT ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -

ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs

69 Civil 407

-against-

UNITED STATES OF AMERICA,

Defendant.

- - - - - - - - - - - - - - - - - -

In the Matter of ANTHONY B.
CATALDO, an attorney

- - - - - - - - - - - - - - - - - -

Anthony B. Cataldo, an attorney, having appeared before this court on May 10, 11, and 14, 1973 as pro se attorney and attorney for Ada W. Cataldo, and the said attorney, after having been admonished by this court with respect to repeated refusal to obey the direction of the court and repeatedly having interrupted the court and continuing to argue matters of evidentiary rulings contrary to the direction of the court, having been required to show

cause why he should not be held for civil contempt, and after hearing the said Anthony B. Cataldo on the 11th and 14th days of May 1973, it is

ADJUDGED that the said Anthony B. Cataldo is guilty of contempt of court, and it is further

ADJUDGED that the said Anthony B. Cataldo be fined the sum of Fifty ($50.00) Dollars.

Dated: New York, N.Y.
May 16, 1973.

(SGD) RICHARD H. LEVET
United States District Judge

THOMAS E. ANDREWS
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1105—September Term, 1973.

(Argued May 30, 1974 Decided June 25, 1974.)

Docket No. 73-2602

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York. Levet, *Judge,* denying appellants' claim for an income tax refund.

Affirmed.

ANTHONY B. CATALDO, New York, N. Y., *for appellants and pro se.*

T. GORMAN REILLY, Assistant United States Attorney, New York, N. Y. (Paul J. Curran, United States Attorney for the Southern District of New York, New York, N. Y.,

and David P. Land, Assistant United States Attorney, of counsel), *for appellee.*

PER CURIAM:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, denying appellants' claim for an income tax refund for the year 1963. Appellants have broadly attacked the decision of the District Court and the fairness of the proceedings before it. We have carefully considered the record and the transcripts of that trial and the briefs submitted to us by the parties and have concluded that appellants were afforded a fair trial and that the District Court did not err in finding for the Government. We therefore affirm.

In the course of the proceedings in the District Court, appellant Anthony B. Cataldo was summoned to show cause why he should not be held in contempt.[1] A judgment so holding was filed on May 18, 1973. Although appellants proffer various arguments attacking the validity of this latter judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review.

Judgment affirmed.

---

1 Although Cataldo was summoned to show cause why he should not be held for civil contempt, both appellants and appellee now treat the contempt judgment as if it were criminal in nature and, indeed, it would seem likely in light of the circumstances surrounding it that it was the judge's intent that it should be so construed.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - -

ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.
- - - - - - - - - - - - - - - - -

69 Civil 407

MEMORANDUM
#41316

APPEARANCES:

Anthony B. Cataldo
Attorney for plaintiffs and pro se
111 Broadway
New York, N.Y.

Whitney North Seymour, Jr., United States Attorney for the Southern District of New York
Attorney for Defendant
David P. Land, Assistant United States Attorney, Of Counsel.

LEVET, D. J.

On May 10, 11 and May 14, 1973, during a trial held before the undersigned, the court determined that Anthony B. Cataldo ("Cataldo") was in contempt by reason of his acts during the trial. A contempt

fine of $50 was imposed by order of May 16, 1973. On or about May 31, 1973 Cataldo paid the said fine of $50.

Thereafter, although an appeal was taken on the action itself (a tax recovery suit), no appeal was taken from the contempt order. At the time of the appeal to the Second Circuit Court of Appeals the court entered the following notation:

> "Although appellants proffer various arguments attacking the validity of the latter (contempt) judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review." Cataldo, et ux. v. United States of America, Docket No. 73-2602 (No. 1105, 2d Cir., June 25, 1974).

Now under a notice of motion dated October 1, 1974, the above-named Cataldo moved for an order remitting the penalty upon an affidavit signed and sworn to September 30, 1974.

The basic determination in the District Court by the undersigned was affirmed

by an order of affirmance on July 23, 1974, and an application by Cataldo to the Supreme Court for enlargement of his time to file a petition for certiorari was denied by the Supreme Court on September 25, 1974, as this court is informed. As above stated, the Court of Appeals refused to review the contempt order.

On October 15, 1974 the court received a letter from Cataldo dated October 14, 1974, which letter is attached hereto.

Under the above circumstances, I see no basis whatsoever for the granting of the application made by Cataldo. It is therefore denied.

So ordered.

Dated: New York, N.Y.
October 16, 1974.

RICHARD H. LEVET
United States District Judge

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of April, one thousand nine hundred and seventy-five.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge.

HON. J. EDWARD LUMBARD

HON. J. JOSEPH SMITH,
Circuit Judges,

- - - - - - - - - - - - - - - - - - -x

ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs-Appellants,

v. : 74-2537

UNITED STATES OF AMERICA,

Defendant-Appellee.

- - - - - - - - - - - - - - - - - - -x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that

Appendix D

the order of said District Court be and it hereby is affirmed.

IRVING R. KAUFMAN, Ch. Judge.

J. EDWARD LUMBARD,

J. JOSEPH SMITH,
Circuit Judges.

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of September one thousand nine hundred and seventy-five

Present:

HONORABLE LEONARD P. MOORE,
HONORABLE WILFRED FEINBERG,
HONORABLE JAMES L. OAKES,
Circuit Judges,

- - - - - - - - - - - - - - - - - -x

ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs-Appellants,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

75-6012

- - - - - - - - - - - - - - - - - -x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by appellant pro se and by counsel for appellee.

ON CONSIDERATION WHEREOF, it is now

Appendix E

hereby ordered that the appeal is dismissed. The order appealed from was a finding of criminal contempt. See Cataldo v. United States, 501 F. 2d 396 (2d Cir. 1974). The notice of appeal from the order should have been filed within ten days from May 18, 1973. Instead, it was filed almost two years later. Appellant claims that the notice was timely because the contempt order was entered on the civil docket rather than on the criminal docket and the time for appeal had not yet started to run under the provision of Rule 4 (b) of the Federal Rules of Appellate Procedure that "A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket." But whatever the intent of that provision in the usual case, see 9 Moore, Federal Practice Par. 203.35, at 795, it was not meant to extendthe time for appeal indefinitely on facts like these, where appellant himself characterized the order as criminal contempt before our prior decision and filed no notice of appeal even after it for nearly ten months, preferring instead to seek another remedy in the district court.

In any event, in an excess of caution, we have heard argument on the merits of the contempt citation and can find no sufficient reason to disturb the judgment of the district court.

LEONARD P. MOORE

WILFRED FEINBERG

JAMES L. OAKES

September 3 , 1975

75-6012
D 11

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of October, one thousand nine hundred and seventy-five

- - - - - - - - - - - - - - - - - - - -

ANTHONY B. CATALDO and
ADA W. CATALDO,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

- - - - - - - - - - - - - - - - - - - -

It is hereby ordered that the motion made herein by counsel for the appelant by notice of motion dated October 15, 1975 for leave to file a petition for rehearing not to exceed 25 pages of printing by any other process of duplicating or copying to and including ten days after decision in the event this motion is granted be and it hereby is granted.

WILFRED FEINBERG
WILFRED FEINBERG
Circuit Judge

Appendix F

UNITED STATES COURT OF APPEALS
For the Second Circuit
- - - - - - - - - - - - - - - - -

ANTHONY B. CATALDO, and
ADA W. CATALDO,

Plaintiffs,

-against-

UNITED STATES OF AMERICA, 75-6012

Defendant,
- - - - - -
In the Matter of ANTHONY B.
CATALDO, an attorney,

Appellant.
- - - - - - - - - - - - - - - - -

The petition for a rehearing by the panel is denied. The statement in the petition (p. 20) that "this court did not have the transcript of the trial before it and it could not have passed upon the merits" is inaccurate. E.g., the court could and did take judicial notice of the appendix filed by appellant in the prior appeal (no. 73-2602, decided at 501 F. 2d 396), which though incomplete, was sufficient.

Appendix G

LEONARD P. MOORE

WILFRED FEINBERG

JAMES L. OAKES

U.S.C.J.J.

Dated: January 6, 1976

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of January, one thousand nine hundred and seventy-six

- - - - - - - - - - - - - - - - -x

ANTHONY B. CATALDO, and
ADA W. CATALDO,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

75-6012

- - - - -

In the Matter of ANTHONY B. CATALDO, an attorney,

Appellant.

- - - - - - - - - - - - - - - - -x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge